OWNERS OF THE SHIP OR VESSEL 'KUSU ISLAND'

v.

THE OWNERS OF CARGO LATELY LADEN ON BOARD THE SHIP OR VESSEL 'BRANI ISLAND'

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
TS SINNATHURAY J
LP THEAN J
[CIVIL APPEAL NO. 77 OF 1983]
14 SEPTEMBER 1989

CIVIL PROCEDURE: *Amendment pursuant to O. 20 r. 1(1) of Rules of the Supreme Court - Application under O. 20 r. 4(1) to disallow amendment - Court to act under O. 20 r. 4(2) Rules of the Supreme Court - The relevancy of O. 20 r. 5(1) and (3), the general provision for amendment - Amendment on grounds of mistake and omission.*

SHIPPING: *Admiralty action in rem cargoes damaged on delivery - Who is the actual defendant - The res or the owner of or parties interested in the res - Effect of owners or parties interested in the res entering an appearance - provision as to period of limitation - Whether time-barred.*

The appellants (defendants) were owners of 3 ships, 'Brani island', 'Senang Island' and 'Kusu Island'. The respondents (plaintiffs) were owners of 93 bales of cotton sheets which were shipped and carried on board the ship 'Brani Island' from Karachi to Singapore under 2 bills of lading. Each of the bills of lading provides that the laws of Singapore shall be the governing law, and in any event the carrier shall be discharged from all liability in respect of loss or damage of goods unless a suit is brought within one year after delivery of the goods.

Unfortunately, part of the cargoes was found damaged when the respondents took delivery of it on 27 October 1979. And just 10 days before the expiry of the period of one year i.e. on 16 October 1980. Respondents commenced admiralty *action in rem* against "The owners of the ship or vessel 'Brani island' claiming damages for breach of contract or negligence.

On 21 April 1981 (6 months late), respondents amended the writ by adding names of 2 sister ships 'Senang Island' & 'Kusu Island' to the writ. The amendment was made without leave pursuant to O. 20 r. 1(1) of Rules of the Supreme Court as the writ had not been served at the material time.

On 23 October 1981, the respondents served the writ on 'Kusu Island' after a further amendment by the deletion of the names of the ships 'Senang Island' & 'Brani Island'. The appellants entered a conditional appearance & following that on 11 November 1981, they applied for an order that the amendment to the writ on 21 April 1981, made by the respondent be disallowed & struck out and that the service of the amended writ be set aside. The Registrar allowed the application. However the learned Judge reversed the Registrar's decision & thus the present appeal to the Court of Appeal.

It is agreed that the appellants were entitled to apply to Court under O. 20 r. 4(1) to disallow the amendment and the appellants in fact did so. On the hearing of an application under r. 4(1), the Court is required to act under r. 4(2) which is as follows:

> Where the Court hearing an application under this rule is satisfied that if an application for leave to make the amendment in question had been made under r. 5 at the date when the amendment was made under r. 1(1) or r. 3(1) leave to make the amendment or part of the amendment would have been refused, it shall order the amendment or that part be struck out.

The main issue is whether if an application to Court for leave to make the amendment by the addition of the 2 ships had been made under r. 5, leave to make that amendment would have been refused. On this issue it is necessary to consider within which of the 2 paragraphs of r. 5, namely para. (1) & (3), the amendment falls.

On the issue of r. 5(1), the appellants contended that in an *action in rem* the defendant, in fact, was the res and not the owner of or other party interested in the res, and consequently, the amendment to the writ, namely the addition of 2 ships, was in effect an addition of 2 "defendants" to the action. As at 21 April 1981, the claim against these 2 "defendants" had already been barred by reason of the expiry of the contractual period of limitation and therefore the amendment should be struck out.

Held:

[1] The amendment does not fall within r. 5(3) of O. 20 Rules of the Supreme Court as there is no material on which the respondents could make out a case of a mistake in not including the names of the 2 sister ships in the writ at the commencement of the action. There is nothing in the affidavit filed on behalf of the respondents to suggest that the omission to insert the names of the 2 sister ships was due or attributable to a mistake, no explanation was given for this omission.

[2] In an *action in rem* against the res, the party that is pleaded is the owner of the res. see *The Parlement Belge & The Cristina*. These authorities show that a defendant in an *action in rem* is as much impleaded as by an *action in personam* and that the actual defendant is not the res but the owner of or party interested in the res.

[3] Nevertheless, as quoted by Fletcher Moulton LJ in *The Burns*, "in the *action in rem* is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, & if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them.

[4] However, the crucial factor here is that the bills of lading in the instant case contains express provision for a one year period of limitation and also incorporates Article III of r. 6 of the Carriage of Goods By Sea Act which provides likewise the same period of limitation. It has been held that such a provision created a timebar of a "special kind" viz, one which extinguished the claim and not one which merely barred the remedy while leaving the claim intact. Here, the writ was taken out only against the res 'Brani Island' initially and was taken prior to the expiry of the limitation period. The amendment to include 'Senang Island' and 'Kusu Island' was made after the expiry of the period of limitation. If the respondents took out writ in rem against 'Senang Island' & 'Kusu Island' at the date claiming for the same damage that claim would have been time-barred. It would than be too late to invoke the admiralty jurisdiction in rem against them or either of them. As stated, an *action in rem* is an action against the res and the amendment is allowed would be calculated to defeat the defence of the period of limitation which the appellants as the defendants would have had if an *action in rem* against 'Kusu island' were instituted at that time. Where, as here, an

action in rem against a proposed ship can be defeated by a plea of limitation, the plaintiff cannot escape the consequence by seeking to add the proposed ship as the res in a pre-existing *action in rem*: See *The Preveze.*

[Appeal allowed]

Cases referred to:
The Dictator [1892] P 304
The Gemma [1899] P 285
The Dupleix [1911] P 8
The August 8 [1983] 2 AC 450
The Parlement Belge [1880] 5 PD 197
The Bold Buccleugh [1851] 7 Moo PCC 267
The Cristina [1938] LlL Rep 147
The Henrich Bjorn [1886] LR 11 AC 270
Aries Tanker Corporation v. Total Transport Ltd. [1977] 1 All ER 398
Mabro v. Eagle, Star and British Dominions Insurance Company, Limited [1932] 1 KB 485
Lucy v. W.T. Henleys Telegraph Works Co. Ltd. [1970] 1 QB 393
Liff v. Peasley [1980] 1 All ER 623
Ketteman v. Hensel Properties Ltd. [1988] 1 All ER 38
The Preveze [1973] 1 Lloyd's Rep 202

Legislation referred to:
Rules of the Supreme Court [Sing], O. 14, O. 15 rr. 6, 7, 8, O. 20 r. 1(1), 3(1), 4(1), (2), 5
Maritime Conventions Act 1911 [UK,] s. 8

For the appellants - Denis Murphy
For the respondents - A.B. Reddy

JUDGMENT

Wee Chong Jin CJ (delivering the judgment of the Court):

The appellants, the defendants in this action, were at the material time the owners of three ships, 'Brani Island', 'Senang Island' and 'Kusu Island'. The respondents, the plaintiffs, were owners of 93 bales of cotton sheets which were shipped and carried on board the ship 'Brani Island' from Karachi to Singapore under two bills of lading dated respectively 15 and 30 September 1979. Each of the bills of lading provides that the laws of Singapore shall be the governing law, and contains, *inter alia*, the usual provisions that in any event the carrier shall be discharged from all liability in respect of loss or damage of the goods unless a suit is brought within one year after delivery of the goods or the date when the goods should have been delivered, and that the contract of carriage is "subject to the provisions of the Rules as applied by the Singapore Carriage of Goods by Sea Ordinance".

The 'Brani Island' arrived in Singapore on 15 October 1979 and the respondents took delivery of the cargoes on 27 October 1979, and it was found that part of the cargoes was damaged. Negotiations between the parties took place, but did not lead to any settlement. Just 10 days before the expiry of the period of one year, i.e. on 16 October 1980, the respondents commenced this admiralty *action in rem* against "The owners of the Ship of Vessel 'Brani Island'" claiming damages for breach of contract and/or negligence. Approximately 6 months later, on 21 April 1981, the respondent amended the writ by deleting "The Owners of the Ship or Vessel 'Brani Island'" and substituting therefor "The Owners of the Ships or Vessels 'Brani Island', 'Senang Island', and 'Kusu Island'". In effect, the amendment consisted of an addition of two ships, 'Senang Island', and 'Kusu Island', to the writ which were sister ships of 'Brani Island'. Thenceforward there were three ships named on the writ, and the

writ could be served on any one of them. At the time of the amendment the writ had not been served; the amendment was made pursuant to O. 20 r. 1(1) of the Rules of the Supreme Court, and no leave of the Court was required.

On 14 October 1981, which was one day before the validity of the writ expired, the respondents took out an *ex-parte* application for a renewal of the writ for a further period of twelve months from 16 October 1981 and an order was made on 23 October 1981 in terms of the application. On the same day, the respondents' solicitors were informed that the ship 'Kusu Island' was in port and, immediately on the following day, the writ, after a further amendment by the deletion of the names of the ships, 'Brani Island' and 'Senang Island', was served on 'Kusu Island'.

This amendment was, of course, essential, and nothing turns on it. On 2 November 1981 the appellants entered a conditional appearance, and following that, on 11 November 1981 applied for an order that the amendment to the writ i.e. the addition of two ships, 'Senang Island' and 'Kusu Island', made by the respondents be disallowed and struck out and that the service of the amended writ on the ship 'Kusu Island' be set aside, or in the alternative, for an order that the order of the Court dated 23 October 1981 renewing the writ for the period of 12 months and the service thereof on the ship 'Kusu Island' be set aside. The appellants' application was heard before the Registrar, and he allowed the application. Against his decision, the respondents appealed, and the appeal was heard before Lai J in Chambers.

Before the learned Judge there were 2 substantive issues. The first was whether the amendment to the writ made by the respondents should be disallowed and struck out and the service of the writ on the ship 'Kusu Island' be set aside, the and the second issue was whether the order made by the Assistant Registrar on 23 October 1981 renewing the validity of the writ for the period of 12 months should be set aside. On the second issue the learned Judge agreed with the learned Registrar and held that the latter had exercised his discretion properly in setting aside the order renewing the validity of the writ. Against this part of his decision there was no appeal. On the first issue the learned Judge allowed the appeal and held that the amendment to the writ ought not to have been struck out: see [1985] 1 MLJ 342. It is against this part of his decision that the appellants brought this appeal.

It is convenient at this stage to refer to the relevant provisions of the Rules of the Supreme Court governing amendments to a writ of summons. As we have said, the amendment to the writ (i.e. the addition of the two ships, 'Senang Island' and 'Kusu Island') was made by the respondents on 21 April 1981; it was made pursuant to O. 20 r. 1(1), and no leave of the Court was required. However, after the amended writ was served, the appellants were entitled to apply to Court under O. 20 r. 4(1) to disallow the amendment; that precisely was what they did. On the hearing of an application under r. 4(1), the Court is required to act under r. 4(2) which is as follows:

> Where the Court hearing an application under this Rule is satisfied that if an application for leave to make the amendment in question had been made under r. 5 at the date when the amendment was made under r. 1(1) or r. 3(1) leave to make the amendment or part of the amendment would have been refused, it shall order the amendment or that part to be struck out.

And r. 5, in so far as relevant provides as follows:

> (1) Subject to O. 15, rr. 6, 7 and 8 and the following provisions of this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in para. (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under para. (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) ...

(5) ...

Having regard to these Rules, the main issue before us is whether if an application to Court for leave to make the amendment by the addition of the two ships had been made under r. 5 on 21 April 1981, leave to make that amendment would have been refused. On this issue it is necessary to consider within which of the two paragraphs of r. 5, namely, paras. (1) and (3), the amendment falls.

The learned Judge treated the amendment as a variation or amplification of the name of the respondents and held that the amendment fell within para. (3) of r. 5 of O. 20. He said, at p. 346:

I am of the view that the amendment, which added the names of both Senang Island and Kusu Island, was merely a variation or amplification of the name of the appellants which owned all three ships at all material times. The appellants were the only defendants intended to be sued from beginning to end. It is fallacious to assume that a new defendant was introduced or added by the amendment. An *action in rem* is not an action against the res itself but is merely a procedural device to obtaining jurisdiction over the owner of the res. In a writ in rem, the defendant is not described simply as 'the ship X' but as 'The Owners of the ship X.'.

And later he continued:

The consideration before me is whether the respondents have brought themselves within para. (3) of O. 20 r. 5. In my view, the respondents have brought themselves within the provisions of that paragraph. The mistake in not including the names of two other vessels was a genuine mistake. What is most significant is the fact that the appellants were the only party impleaded at all material times. And they knew it beyond any peradventure.

In effect, he held that the amendment was a correction of the name of the defendants, i.e. the appellants, and the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the appellants. With respect, we find ourselves unable to agree with the learned Judge on this point.

In our opinion, the amendment was not a correction of the name of the appellants; their name as originally appeared in the writ was correct: "The Owner of the ship or vessel; 'Brani Island'". What the plaintiffs, i.e. the respondents, did was to add to that name two sister ships of 'Brani Island', namely, 'Senang Island' and 'Kusu Island'. There is nothing in the affidavits filed on behalf of the respondents to suggest that the omission to insert the names of the two sister ships at the time of the commencement of the action was due or attributable to a mistake; no explanation was given for this omission. Nor was there any statement by anyone on their behalf to say or explain when and how they came to know that 'Senang Island' and 'Kusu Island' were sister ships of 'Brani Island'. It is true that 'Brani Island'

was broken up, but this came to the knowledge of the respondents' solicitors only in March 1982 or thereabouts. In his affidavit affirmed on 4 March 1982, Mr. Gopalan, the solicitor for the respondents, said as follows:

> It has lately come to my attention that the vessel 'Brani Island' was broken up and disposed off in Pakistan. This was reported in August 1981 issue of Lloyds Register of Shipping, Casualty Return. A copy of p. 76 of the said return is annexed and marked 'KG7'. The actual date of breaking up is not known. The return reports it to have been during the quarter ended 31 December 1980.

There was therefore no material on which the respondents could make out a case of a mistake in not including the names of the two sister ships in the writ at the commencement of this action. Hence, the amendment, in our judgment, does not fall within para. (3) of r. 5 of O. 20.

The next question is whether the amendment ought to be allowed under the general provision in para. (1) of r. 5 of O. 20. It was contended on behalf of the appellants that in an *action in rem* the defendant, in fact, was the res and not the owner of or other party interested in the res, and consequently, the amendment to the writ, namely, the addition of two ships, 'Senang Island' and 'Kusu Island', was in effect an addition of two "defendants' to the action. As at 21 April 1981, the claim against these two "defendants" had already been barred by reason of the expiry of the contractual period of limitation, and, therefore, such an amendment ought not be allowed and ought to be struck out. In support, Counsel relied on *The Dictator* [1892] P 304, *The Gemma* [1899] P 285, *The Dupleix* [1911] P 8 and *The August 8* [1983] 2 AC 450. The proposition that in an *action in rem* the actual defendant is the res is somewhat startling, and we now turn to examine these authorities to see if they really afford any support.

The starting point is *The Dictator*. There, the plaintiffs initiated an *action in rem* for salvage services rendered and the writ was addressed to the owners and parties interested in the ship, 'Dictator', her cargo and freight, claiming for 5000 pounds for salvage services. The solicitors for the owners of the 'Dictator' gave an undertaking to appear for the defendants and to put in bail in an amount not exceeding 5000 pounds in consequence of which the ship was not arrested. The action was subsequently tried and a sum of 7500 pounds was awarded, and the plaintiffs with leave of the Court amended the endorsement on the writ by increasing the amount of the claim to 8500 pounds. The defendants paid the costs and offered to pay 5000 pounds for which they had undertaken to put in bail; but that sum the plaintiffs declined to accept. The question which eventually arose was whether execution could be issued against the owners of the salved ship, her cargo and freight for more than 5000 pounds and cost. It was held by Jeune J that the plaintiffs were entitled in the action to issue a writ of fieri facies to enforce payment of the full amount awarded. The learned Judge reviewed numerous authorities touching on the Admiralty Court jurisdiction in rem, in the course of which he said, at pp. 320-321:

> In *The Parlement Belge* [1880] 5 PD 197 it was said that *The Bold Buccleugh* [1851] 7 Moo. PCC 267 decides that 'an *action in rem* is a different action from one *in personam* and has a different result.' But I do not think it follows, or that the Privy Council or the Court of Appeal intended to lay down that an *action in rem* could affect only the res. It may well be that, if the owners do not appear, the action only enforces the lien on the res, but that, when they do, the *action in rem* not only determines the amount of the liability, and in default of payment enforces it on the res, but is also a means of enforcing against the appearing owners, if they could have been made personally liable in the Admiralty Court, the complete claim of the plaintiff so far as the owners are liable to meet it. It appears to me consonant with common sense that if the owners have had no personal notice, and are not, save in the

sense indicated in *The Parlement Belge* before the Court, the effect of its judgment should be limited to the res in its hand, but that, if the owners appear to contest or reduce their liability, they should be placed in the same position as if they had been brought before the Court by a personal notice.

This decision was approved by the Court of Appeal in *The Gemma* (*supra*). There, the plaintiff whose ship was involved in a collision with the ship 'Gemma' initiated an *action in rem* and caused the 'Gemma' to be arrested. The solicitors for the defendants - the owners of the 'Gemma' - entered an appearance and undertook to put in bail, and bail in an amount equal to the value of the 'Gemma' and her freight was provided. Subsequently, the action was tried and the plaintiff obtained judgment against the defendants for an amount exceeding the amount for which the bail had been given. The defendants paid to the plaintiff the amount equal to that of the bail; the plaintiff then sued out a writ of *fieri facias* for the unsatisfied balance. It was held that the defendants by appearing had submitted themselves to the jurisdiction of the Court and rendered themselves personally liable and therefore payment of the balance could be enforced under a writ of *fieri facias*. A.L. Smith, LJ said at p. 291-292:

Now, apart from authority, it appears to me that when persons, whose ship has been arrested by the marshal of the Admiralty Court, think fit to appear and fight out their liability before the Court, the form of the proceedings in the Admiralty Court shew - and it is not disputed that the forms I have referred to are those which have been in use, according to the practice of the Court, from olden times - that the persons so appearing, as the defendants have done in the present case, become parties to the action, and thereby become personally liable to pay whatever in the result may be decreed against them; and the action, though originally commenced in rem, becomes a personal action against the defendants upon appearance.

These principles as laid down in *The Dictator* and *The Gemma* were followed in *The Dupleix* where the facts were substantially identical with those in *The Gemma*. In all these cases, the defendants appeared to contest or reduce their liabilities, and the judgments entered were held to be enforceable against them personally.

We now come to the case of *The August 8* (*supra*). That was an *action in rem* initiated by the master against the ship 'August 8' and her owners in the High Court, Singapore. The shipowners entered an unconditional appearance and the master applied for summary judgment under O. 14, and the summary judgment was entered. The shipowners subsequently applied to set aside the judgment on the ground that the Registrar had no jurisdiction to hear an application for summary judgment under O. 14 in an admiralty *action in rem*. This application was dismissed by the High Court, and following that, an appeal to the Court of Appeal was dismissed and a further appeal to the Judicial Committee of Privy Council was also dismissed. One of the grounds for dismissing the appeal was as stated by Lord Brandon at p. 456:

In their Lordships' opinion there is another ground additional to the other grounds already dealt with by them in this judgment, and not adverted to at any time in the previous course of the proceedings, on which the shipowners' appeal is bound to fail. By the law of England, once a defendant in an Admiralty *action in rem* has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that, from then on, the action continues against him not only as an *action in rem* but also as an action personam: *The Gemma* [1899] P 285, 292 per AL Smith LJ. There is no reason to suppose that the Admiralty law of Singapore differs from the Admiralty law of England so far as this important principle is concerned. On the contrary there is every reason to suppose that it is the same. If then that principle is applied in the present case, the situation is that, from the time when the shipowners entered an appearance in the master's action, as they did on 2 February 1978, the action continued not only in rem against the property proceed against, namely, the ship, but also *in personam* against the shipowners

> themselves. It follows that even if, contrary to the views which their Lordships have earlier expressed, an Admiralty *action in rem* were excluded from the scope of O. 14, it would in any case be impossible to regard an admiralty *action in personam* as similarly excluded. In so far therefore as, from the time of the shipowners' appearance, the master's action continued against them as an *action in personam* as well as an *action in rem*, it is clearly a kind of action to which O. 14 applied.

The principles that can be deduced from these authorities are briefly these. In an admiralty *action in rem* where a defendant enters an unconditional appearance, he submits to the jurisdiction of the Court personally and from then onwards the action continues as an *action in rem* and *in personam*, and judgment may be entered and enforced against him to the full extent of the damages awarded to the plaintiff and is not limited to the value of the res or the bail which represents the res. In consequence if judgment is entered for the plaintiff and is not fully satisfied by enforcement thereof against the res, execution proceedings for the balance may be initiated against the defendant personally: it is a judgment in rem against the res as well as *in personam* against the defendant personally.

It is clear to us that all the cases relied upon by Counsel for the appellants do not really support his contention that in an admiralty *action in rem* the defendant is the res itself and not the owner of or party interested in the res. On the contrary, there are authorities to the effect that even in an *action in rem* against the res, the party that is impleaded is the owner of the res. In *The Parlement Belge* [1880] LR 5 P 197, the plaintiff commenced proceedings in rem against the ship 'Parlement Belge', to recover damages in respect off a collision. The ship was then owned by the King of the Belgians. The writ was served on her and no appearance was entered. The plaintiff moved for judgment and for a warrant to be issued for the arrest of the ship. The Attorney-General objected, asserting that the Court had no jurisdiction to entertain the suit. One of the questions raised and argued was whether the Court had jurisdiction to seize the ship in a suit in rem. Brett LJ delivering the judgment of the Court of Appeal held that as the ship was the property of an independent sovereign, the Court would decline to exercise jurisdiction over the ship in a suit in rem, and said, at p. 217:

> This proposition (i.e. the Court could not exercise jurisdiction) would determine the first question in the present case in favour of the protest (of the Attorney-General), even if an *action in rem* were held to be a proceeding solely against the property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the Court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded.

Later he said that the owner was "at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court."

The Parlement Belge was approved by the House of Lords in *The Cristina* [1938] LlL Rep 147. In that case, the plaintiffs who were the owners of the ship 'Cristina' took out a writ *in rem* claiming as owners of the ship to have possession adjudged to them. The 'Cristina' was a Spanish ship, and at that time was lying at Cardiff. The Spanish Consul had boarded the ship and taken possession thereof, and on behalf of the Spanish Government claimed that she had been requisitioned by virtue of a decree passed by the Spanish Government. A writ was taken out by the owner and was addressed to the ship 'Cristina and all persons claiming an interest therein. The Spanish Government entered a conditional appearance and took out a motion to set aside the writ on the ground that the ship was in *de facto* possession

of the Spanish Government and the Government was impleaded by the writ *in rem*. The House of Lords held that the Spanish Government was directly impleaded by the action. Lord Atkin said, at p. 157:

> I come to the conclusion that when the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel Cristina and all persons claiming an interest therein, in the body of which the same ship and all persons claiming an interest therein were commanded within eight days to cause an appearance to be entered for them in the Probate Divorce and Admiralty Division and on which they indorsed the claim to have possession adjudged to them of the said steamship or vessel Cristina, they were directly impleading the Spanish Government whom they knew to be the only persons interested in the Cristina other than themselves, and from whom they desired that possession should be taken after it was adjudged to them.

Similar pronouncement was made by Lord Wright. He said at p. 163:

> To take the present case, the writ names as defendants the Cristina and all persons claiming an interest therein and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel) and gives notice that in default of so doing the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment *in rem* is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which on the facts I have stated they beyond question *de facto* enjoy.
>
> The writ by its express terms commands the defendants to appear or let judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett LJ, the independent Sovereign is thus called upon to sacrifice either his property or his independence.
>
> It is, I think, clear that no such writ can be upheld against the Sovereign State unless it consents. It is therefore given the right, if it desires neither to appear nor to submit to judgment, to appear under protest and apply to set aside the writ or take other appropriate procedure with the same object. It may be said that it is indirectly impleaded, but I incline to think that it is more correct to say that it is directly impleaded.

These authorities show that a defendant in an *action in rem* is as much impleaded as by an *action in personam* and that the actual defendant is not the res but the owner of or party interested in the res. We therefore reject the argument of Counsel for the appellant and agree entirely with the view of the learned Judge that it is fallacious that a new defendant was added or introduced by the amendment to the writ.

There still remains the question whether the respondents ought to be allowed in the circumstances to amend the writ in the way they did, namely, by adding to the writ the two ship, 'Senang Island' and 'Kusu Island', on 21 April 1981 which was long after the expiry of the contractual period of limitation. In considering this question, two points have to be borne in mind. First, an *action in rem* is against the res, though the actual defendant is the owner of or party interested in the res.

In *The Bold Buccleugh* [1851] 7 Moo. PCC 267 [13 ER 884] the Judicial Committee of Privy Council, on an appeal from the High Court of Admiralty, rejected the argument that in proceedings *in rem*, the arrest of the vessel was only a means of compelling appearance of the owners and held that proceedings *in rem*, whether for wages, salvage, collision or bottomry was against the ship in the first instance, and if the owners did not appear to the warrant arresting the ship the proceedings would continue without reference to their default and the decree was "confined exclusively to the vessel". In *The Henrich Bjorn* [1886] LR 11 AC 270, Lord Watson said, at pp. 276-277:

> The action is *in rem*, that being as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises.

In *The Burns* [1907] P 137 at p. 148 Fletcher Moulton LJ specifically dealt with this point, he said:

> The very able argument of Counsel for the appellants rests upon the contention that the process of arrest of a vessel in virtue of a maritime lien created by the circumstances of a collision is merely a method of enforcing an appearance in an action. In other words, that an *action in rem* in no way differs in its nature from an *action in personam*; save that there is attached to it a means of compelling the appearance of the defendant by arrest of the vessel.
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> I am of opinion that this view cannot be supported. The two cases upon which Counsel have chiefly relied - *The Dictator* and *The Gemma* - appear to me, when closely examined, to negative and not to support that proposition. They both of them treat the appearance as introducing the characteristics of an *action in personam*. In other words, it is not the institution of the suit that makes it a proceeding *in personam*, but the appearance of the defendant.

Later, he said, at p. 149:

> I am, therefore, of opinion that the fundamental proposition of the argument of the appellants' Counsel fails, and that the *action in rem* is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified.

Following from what Fletcher Moulton LJ said, if no appearance is entered by the defendant to such an action, judgment when entered is enforceable only against the res, and no more, and the defendant in such an action will not suffer any personal liability. As we have said, once the defendant to an *action in rem* has entered an unconditional appearance he submits to the jurisdiction of the Court personally and from then onwards the action continues as an *action in rem* and *in personam*.

Secondly, the bills of lading in the instant case each contains an express provision for a one year period of limitation and also incorporates Article III of r. 6 of the Carriage of Goods by Sea Act which provides likewise the same period of limitation. This period expired on 26 October 1980. In *Aries Tanker Corporation v. Total Transport Ltd.* [1977] 1 All ER 398 the House of Lords held, *inter alia*, that such a provision as Article III of r. 6 of the Hague Rules created a time-bar of "a special kind", viz. one which extinguished the claim and not one which merely barred the remedy while leaving the claim intact.

The writ in this case was taken out prior to the expiry of the limitation period. But it was taken out only against the res, 'Brani Island'. The amendment to include 'Senang Island' and 'Kusu Island' was made approximately 6 months after the expiry of the period of limitation. If at that date the respondents took out a writ *in rem* against 'Senang Island' and 'Kusu Island' or either of them claiming for the same damage (as claimed in this action) that

claim would have been time-barred. It would then be too late to invoke the admiralty jurisdiction in rem against them or either of them. In particular, if 'Kusu Island' were not named in the writ, the respondent would not have that res against which they could proceed at that time. Viewed in this light, ought the amendment of adding 'Senang Island' and 'Kusu Island' to the writ be allowed?

There is no direct authority bearing on this point. Some assistance, however, can be derived from an analogous position of adding a new party or a new cause of action after the lapse of the period of limitation. In *Mabro v. Eagle, Star and British Dominions Insurance Company, Limited* [1932] 1 KB 485 at p. 487, Scrutton LJ said:

> In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the statute of limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence.

In that case the plaintiffs applied for leave to amend the writ by adding a plaintiff and the application was made under the relevant rule which provides:

> where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

The application, however, was made after the lapse of the statutory period of limitation, and was refused. This principle was followed in another decision of Court of Appeal in *Lucy v. W.T. Henleys Telegraph Works Co. Ltd.* [1970] 1 QB 393, in which the Court similarly refused on an application by the plaintiff to join a new defendant against whom the claim was barred by the statute of limitation. Megaw LJ said, at p. 411:

> I am unaware of any case in which leave to amend a writ has been given in such circumstances: namely where the joinder of a new defendant would be calculated to defeat a right as to limitation which he would have had if an action were to be brought by the plaintiff against him alone.
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> As I understand it, *Mabro's* case [1932] 1 KB 485 is authority for the proposition that it cannot be done. That case was concerned with an application to amend the writ so as to join a plaintiff. It was held that leave would not be granted where the effect would be to prevent the defendant from relying on the statute of limitations. The same principle applies in relation to the joinder of a defendant. Where, as here, a direct action against a proposed defendant can be defeated by a plea of limitation, the plaintiff cannot escape that consequence by seeking to join the proposed defendant as a party in pre-existing proceedings.

The facts in *Mabro* and *Lucy* were admittedly different from those in the instant case. Nevertheless, in our judgment, the principle as laid down in those cases - which actually is an established rule of practice of the Court in England: see *Liff v. Peasley* [1980] 1 All ER 623 and *Ketteman v. Hensel Properties Ltd.* [1988] 1 All ER 38 - is equally applicable here. An *action in rem* is an action against the res, and, in the language of Megaw LJ, the amendment here, if allowed, would be calculated to defeat the defence of the period of limitation which the appellants as the defendants would have had if an *action in rem* against 'Kusu Island' were instituted at that time. Where, as here, an *action in rem* against a proposed ship can be defeated by a plea of limitation, the plaintiff cannot escape the consequence by seeking to add the proposed ship as the res in a pre-existing *action in rem*.

We have been referred by Counsel for the appellants to *The Preveze* [1973] 1 Lloyds's Rep 202. The relevant facts there were somewhat similar to those of the instant case. The plaintiffs vessel collided with the first defendant's vessel "Preveze" which was then towed by the second defendant's vessel "Jacob van Heemskerk". The plaintiff took out a writ *in rem* against the "Perveze" and "Jacob van Heemskerk" but the writ was not served. Negotiations followed and the writ was renewed for 12 months, and on or immediately following the renewal the plaintiff without leave of the Court amended the writ under O. 20 r. 1 of the English Rules of the Supreme Court by adding the names of nine other vessels belonging to the second defendant. Subsequently, the writ was served on the "Utrecht" (one of the nine vessels added to the writ). The relevant period of limitation applicable in that case was governed by s. 8 of The Maritime Conventions Act 1911 which, so far as relevant, is as follows:

> No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, ... caused by the fault of the former vessel, ... unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused ...
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> Provided that any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of Court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the Court, or within the territorial waters of the country, to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

When the amendment to the writ by adding, amongst others, the name of the ship "Utrecht" was made, nearly three years had elapsed since the date of collision; hence the two-year period in s. 8 had expired. Further, within the first year since the issue of the writ, the "Utrecht" had been within the jurisdiction for a number of times. The second defendant therefore applied by motion for, *inter alia*, an order that the amendment of the writ made without leave of the Court be disallowed and service of the amended writ on the "Utrecht" be set aside. The application was heard before Mocatta J. He considered the question of exercise of his discretion under the proviso to s. 8 of The Maritime Conventions Act 1911 and not under O. 20 r. 5, the former conferring a wider discretion. He said at pp. 205-206:

> It was accepted by Mr. Stone for the plaintiffs that whether or not the Court would have allowed the writ to be amended by the addition of the Utrecht and the eight other sisterships would have depended upon whether the Court thought fit to do so under the wide discretion conferred on it by the first limb of the provisio of s. 8. Mr. Staughton at one time, as I understood him, was inclined to argue that I should have regard merely to the Rules of Court and that the powers of the Court under O. 20, r. 5 were very limited where an amendment affects rights which had accrued after a period of limitation had expired. This is no doubt true in a case to which s. 8 of the Act of 1911 is inapplicable, but, where the section applies, the position is exceptional in that the very section imposing a period of limitation itself by the proviso grants a discretion to allow an extension of the period. In *The Espanoleto*, [1920] p. 223, at p. 226; [1920] 3 Ll.L.Rep. 91 at p. 91, Mr. Justice Hill said:
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> In my judgment, when an application to extend the time for the renewal of a writ in an action which comes within s. 8 is made, the matter is not to be disposed off merely by saying that the two years have elapsed and the claim is statute barred and no renewal can be granted. The application to renew must be considered on its merits, and the Court must inquire whether the circumstances are such that the Court would give leave to issue a writ, notwithstanding that the time had expired.

In his reply, Mr. Staughton submitted that the discretion under s. 8 was exercised on similar principles to those applicable at common law when considering whether the writ should be renewed after an expiry of a period of limitation.

I think the right way to approach the problem of the exercise of discretion here is to consider whether the Court would have given leave to issue a writ against the Utrecht on 7 April 1972, the two-year period having expired on 24 April 1971.

He then went on to consider the relevant facts before him, and having regard to the unusual circumstances in that case he said he would be disposed to exercise his discretion to grant an extension of time, if the application had been made in early August 1971; but he concluded that after a passage of eight months since the beginning of August 1971; the lapse of time "was too long and unjustified to warrant the exercise of the statutory discretion." He therefore struck out the amendment and set aside the service of the writ on the "Utrecht."

In the instant case, we do not have such statutory discretion for granting an extension of time. A *fortiori*, having regard to the nature of an *action in rem* and the lapse of the contractual period of limitation, leave for the amendment ought to be refused, and, accordingly, the amendment ought to be struck out. In the result, we allow the appeal and set aside that part of the order of the learned Judge appealed against and restore the part of the order of the Registrar set aside by the learned Judge. The appellants will have their costs here and below, and the amount deposited in Court as security for costs is to be repaid to them or their solicitors.

Also found at [1989] 2 CLJ 1306